Nur Fuziatun bt Mohd Fadzli (suing through his father and litigation representative, Mohd Fadzli bin Jamil) v Gombak Medical Centre Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1327–08 OF 2024
AZIZAH NAWAWI, AZIZUL AZMI ADNAN AND FAIZAH JAMALUDIN JJCA
12 NOVEMBER 2025

Tort — Negligence — Medical negligence — Duty of care — Common law duty — Plaintiff suffered brain injury arising from circumstances of her birth resulting in cerebral palsy — Plaintiff sued private hospital, person in charge of private hospital and doctor who undertook delivery of plaintiff — Whether duty of care existed — Whether injury suffered by plaintiff was reasonably foreseeable — Whether there was relationship of proximity between plaintiff and defendants — Whether it was just, fair and reasonable to impose duty of care — Whether there was breach of duty on the part of private hospital and person in charge of private hospital to provide timely access to neo-natal intensive care facilities — Whether breach of duty by private hospital and person in charge of private hospital materially and adversely contributed to plaintiff's condition

In the High Court, the plaintiff via her father and litigation representative, filed an action for medical negligence against the defendants. The first defendant was the private medical facility where the plaintiff was delivered. The second defendant, the head of the Obstetrics and Gynaecology Department of the first defendant, was the 'person in charge' of the first defendant within the meaning of s 32 of the Private Healthcare Facilities and Service Act 1998. The third defendant was the doctor who undertook delivery of the plaintiff. The plaintiff claimed that she had suffered brain injury arising from the circumstances of her birth, resulting in cerebral palsy. It was a permanent and life-long condition. The plaintiff claimed that the defendants were negligent in providing medical care to the plaintiff and her mother and in attending to her birth. There was a long list of allegations of negligence, which included the failure to have an adequate system of referrals, in having appropriately qualified specialists available on standby, in the failure to properly diagnose fetal distress and in negligently undertaking a vacuum extraction. At the end of the trial, the High Court found that the case against the third defendant failed on account that the plaintiff failed to establish causation: that the plaintiff's condition was brought about by the negligence of the third defendant in carrying out the delivery. Specifically, the High Court found that: (a) the absence of complete cardiotocography records precluded the court from finding that the third

defendant had in any way acted negligently in attending to the birth of the plaintiff; (b) the light meconium-stained liquor did not provide conclusive proof that a foetus was in distress; (c) that plaintiff's own expert, Dr Ong, agreed that in 85-90% of cases, cerebral palsy developed in utero and only in the remainder of cases that the condition arose as a result of the acts of doctors; and (d) on the contention that the third defendant had incorrectly carried out the vacuum extraction delivery, the court found that the delivery had been carried out in accordance with the procedures recommended in a publication entitled 'Vacuum Extraction' published by the US National Library of Medicine. As a result of these findings, the High Court opined that the issues relating to the liabilities of the first and second defendants also fell away. Consequently, the High Court dismissed the plaintiff's claim, hence, the present appeal by the plaintiff.

Held, allowing the plaintiff's appeal against the first and second defendants and dismissing the plaintiff's appeal against the third defendant:

(1) The court found that there existed a general duty on the part of the second defendant, as the person in charge of the first defendant, to take reasonable care in the running of the hospital facilities to protect its patients from harm, and that this duty was owed to the plaintiff. The ingredients in establishing the existence of a duty of care had been fulfilled. In this regard, the court found that the injury suffered by the plaintiff was reasonably foreseeable, there was a relationship of proximity between the plaintiff and the second defendant, and it was just, fair and reasonable to impose a duty of care on the second defendant. In addition, at common law, a duty arose on the part of the first and second defendants to ensure that there would be timely access to all medical experts (including specialists in anaesthesiology and neo-natal care) as would be necessary to deal with complications that could reasonably be expected to arise in childbirth. This was not, however, a duty that was extended to the third defendant, as the physician undertaking the delivery of the baby (see paras 11, 27, 31–32, 38 & 41).

(2) The first and second defendants had breached their duty of care by failing to make available a paediatrician specialising in neo-natal care whether on-call or for consultation at the time the delivery of the plaintiff was undertaken. There had been an unacceptable delay in transferring the plaintiff to a hospital that had neo-natal intensive care facilities and that this delay breached the duty of care that was owed by the first and second defendants to the plaintiff. In the case of the third defendant, the court was satisfied that she had done all that she could have in the circumstances to ensure that the plaintiff received the appropriate care in a timely manner (see paras 11, 47 & 59).

(3) The fact that the third defendant recorded that the cardiotocography readings were still acceptable showed that the heart rate of the baby was still being monitored throughout the second stage of labour via a cardiotocogram. While the detection of light meconium stained liquor may be one of the indications of fetal distress, based on the evidence received at trial it was not definitive and may even be present in a normal pregnancy. In addition, there was no applicable guideline that suggested that an emergency caesarean section ought to be carried out where light meconium stain was detected. In short, there was no negligence on the part of the third defendant either in diagnosing fetal distress or in the manner she had undertaken the delivery of the plaintiff (see paras 11, 65, 67 & 71).

(4) The finding of fact by the trial judge that causation had not been proven was plainly wrong, as there were critical items of evidence that were not taken into account in the analysis of the facts in the grounds of judgment of the High Court: (a) the low Apgar score established that the baby suffered from respiratory issues, and hypoxia was one of the causes for cerebral palsy; (b) neither the plaintiff nor her mother possessed any of the risk factors that indicated congenital cerebral palsy; and (c) the unanimous view of both the experts was that the plaintiff's cerebral palsy developed as a result of the complications at birth. The High Court could not have come to a contrary finding without concluding that those opinions were obviously indefensible and unsupported by the basic facts of the case (see paras 11 & 95).

(5) In the court's considered judgment, the breach of duty on the part of the first and second defendants to provide timely access to neo-natal intensive care facilities materially and adversely contributed to the plaintiff's condition. As explained above, this was the unanimous view of the experts who testified in the present case (see paras 11 & 96).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, plaintif melalui bapanya dan wakil litigasi, memfailkan tindakan kecuaian perubatan terhadap defendan-defendan. Defendan pertama adalah fasiliti perubatan swasta tempat plaintif dilahirkan. Defendan kedua, ketua Jabatan Obstetrik dan Ginekologi defendan pertama, adalah 'orang yang bertanggungjawab' bagi defendan pertama mengikut maksud s 32 Akta Kemudahan dan Perkhidmatan Penjagaan Kesihatan Swasta 1998. Defendan ketiga adalah doktor yang menyambut kelahiran plaintif. Plaintif mendakwa bahawa dia telah mengalami kecederaan otak yang timbul daripada keadaan kelahirannya, yang mengakibatkan cerebral palsy. Ia adalah suatu keadaan yang kekal sepanjang hayat. Plaintif mendakwa bahawa defendan-defendan cuai dalam menyediakan rawatan perubatan kepada plaintif dan ibunya serta dalam menyambut kelahirannya. Terdapat senarai panjang dakwaan kecuaian, yang termasuk kegagalan untuk mempunyai sistem rujukan yang mencukupi,

dalam mempunyai pakar yang berkelayakan dan bersedia, dalam kegagalan untuk mendiagnosis tekanan janin dengan betul dan dalam cuai menjalankan pengekstrakan vakum. Pada akhir perbicaraan, Mahkamah Tinggi mendapati bahawa kes terhadap defendan ketiga gagal kerana plaintif gagal membuktikan sebab-akibat: bahawa keadaan plaintif disebabkan oleh kecuaian defendan ketiga dalam menyambut kelahiran. Secara khususnya, Mahkamah Tinggi mendapati bahawa: (a) ketiadaan rekod kardiotokografi yang lengkap menghalang mahkamah daripada mendapati bahawa defendan ketiga telah bertindak cuai dalam menguruskan kelahiran plaintif; (b) 'light meconium-stained liquor' tidak memberikan bukti muktamad bahawa janin berada dalam keadaan tertekan; (c) bahawa pakar plaintif sendiri, Dr Ong, bersetuju bahawa dalam 85-90% kes, cerebral palsy berkembang dalam rahim dan hanya dalam kes-kes selebihnya keadaan tersebut timbul akibat tindakan doktor; dan (d) atas dakwaan bahawa defendan ketiga telah menjalankan kelahiran pengekstrakan vakum secara salah, mahkamah mendapati bahawa kelahiran telah dijalankan mengikut prosedur yang disyorkan dalam penerbitan bertajuk 'Vacuum Extraction' yang diterbitkan oleh US National Library of Medicine. Hasil daripada dapatan ini, Mahkamah Tinggi berpendapat bahawa isu-isu berkaitan liabiliti defendan pertama dan kedua juga menjadi tidak mampan. Akibatnya, Mahkamah Tinggi menolak tuntutan plaintif, justeru, rayuan semasa oleh plaintif.

Diputuskan, membenarkan rayuan plaintiff terhadap defendan pertama dan kedua, dan menolak rayuan plaintif terhadap defendan ketiga:

(1) Mahkamah mendapati bahawa terdapat kewajipan am di pihak defendan kedua, sebagai orang yang bertanggungjawab ke atas defendan pertama, untuk mengambil langkah berjaga-jaga yang munasabah dalam mengendalikan kemudahan hospital bagi melindungi pesakitnya daripada bahaya, dan kewajipan ini terhutang kepada plaintif. Elemen-elemen bagi membuktikan kewujudan kewajipan berjaga-jaga telah dipenuhi. Dalam hal ini, mahkamah mendapati bahawa kecederaan yang dialami oleh plaintif boleh dijangka secara munasabah, terdapat hubungan kedekatan antara plaintif dan defendan kedua, dan adalah adil, saksama dan munasabah untuk mengenakan kewajipan berjaga-jaga ke atas defendan kedua. Di samping itu, mengikut 'common law', terdapat satu kewajipan timbul di pihak defendan pertama dan kedua untuk memastikan bahawa terdapat akses tepat pada masanya kepada semua pakar perubatan (termasuk pakar dalam anestesiologi dan penjagaan neonatal) sebagaimana yang diperlukan untuk menangani komplikasi yang boleh dijangka timbul semasa bersalin. Walau bagaimanapun, ini bukanlah kewajipan yang dilanjutkan kepada defendan ketiga, sebagai doktor yang menyambut kelahiran bayi (lihat perenggan 11, 27, 31–32, 38 & 41).

(2) Defendan pertama dan kedua telah melanggar kewajipan berjaga-jaga

mereka dengan gagal menyediakan pakar pediatrik yang pakar dalam penjagaan neonatal sama ada atas panggilan atau untuk perundingan pada masa kelahiran plaintif dijalankan. Terdapat kelewatan yang tidak boleh diterima dalam pemindahan plaintif ke hospital yang mempunyai kemudahan rawatan rapi neonatal dan kelewatan ini melanggar kewajipan berjaga-jaga yang terhutang oleh defendan pertama dan kedua kepada plaintif. Dalam kes defendan ketiga, mahkamah berpuas hati bahawa dia telah melakukan segala yang termampu dalam keadaan tersebut untuk memastikan plaintif menerima penjagaan yang sewajarnya tepat pada masanya (lihat perenggan 11, 47 & 59).

(3) Hakikat bahawa defendan ketiga merekodkan bahawa bacaan kardiotokografi masih boleh diterima menunjukkan bahawa kadar denyutan jantung bayi masih dipantau sepanjang peringkat kedua proses bersalin melalui kardiotokgram. Walaupun pengesanan 'light meconium stained liquor' mungkin merupakan salah satu petunjuk tekanan pada janin, berdasarkan keterangan yang diterima semasa perbicaraan, ia tidak muktamad dan mungkin juga terdapat dalam kehamilan normal. Di samping itu, tiada garis panduan yang terpakai yang mencadangkan bahawa pembedahan caesarean kecemasan harus dijalankan apabila 'light meconium stain' dikesan. Pendek kata, tiada kecuaian di pihak defendan ketiga sama ada dalam mendiagnosis tekanan pada janin atau dalam cara dia menguruskan kelahiran plaintif (lihat perenggan 11, 65, 67 & 71).

(4) Dapatan fakta oleh hakim bicara bahawa sebab-akibat tidak dibuktikan adalah jelas salah, kerana terdapat keterangan kritikal yang tidak diambil kira dalam analisis fakta dalam alasan penghakiman Mahkamah Tinggi: (a) skor Apgar yang rendah membuktikan bahawa bayi tersebut mengalami masalah pernafasan, dan hipoksia adalah salah satu punca cerebral palsy; (b) plaintif mahupun ibunya tidak mempunyai apa-apa faktor risiko yang menunjukkan cerebral palsy kongenital; dan (c) pandangan sebulat suara kedua-dua pakar adalah bahawa cerebral palsy plaintif berkembang akibat komplikasi semasa lahir. Mahkamah Tinggi tidak mungkin dapat membuat dapatan yang bertentangan tanpa menyimpulkan bahawa pendapat tersebut jelas tidak dapat dipertahankan dan tidak disokong oleh fakta asas kes (lihat perenggan 11 & 95).

(5) Dalam penghakiman mahkamah yang dipertimbangkan, pelanggaran kewajipan defendan pertama dan kedua untuk menyediakan akses tepat pada masanya kepada kemudahan rawatan rapi neonatal telah menyumbang secara material dan negatif kepada keadaan plaintif. Seperti yang dijelaskan di atas, ini adalah pandangan sebulat suara pakar-pakar yang memberi keterangan dalam kes semasa (lihat perenggan 11 & 96).]

Cases referred to

A minor (a minor suing through his mother and litigation representative, CCY) & Ors v Pengarah Hospital Tuanku Ja'afar, Seremban & Ors [2025] 7 MLJ 422; [2024] 10 CLJ 22, HC (refd)

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, QBD (refd)

Bolitho v City & Hackney Health Authority [1997] 3 WLR 1151, HL (refd)

Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615, HL (refd)

Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593; [2007] 1 CLJ 229, FC (refd)

Lo Sook Ling Adela v Au Mei Yin Christina & Anor [2002] SCD 46; [2002] 1 SLR 408, CA (refd)

Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171; [2014] 9 CLJ 337, CA (refd)

Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30, SC (refd)

Pengarah Hospital Selayang & Ors v Ahmad Azizi bin Abdullah James & Ors [2012] 5 MLJ 679; [2013] 3 CLJ 833, CA (refd)

PP v Muhamad Suhaimi bin Abdul Aziz [2004] 1 CLJ 378, CA (refd)

R v Byrne [1960] 2 QB 396; [1960] 44 Cr App Rep 246, CA (refd)

Sek Kim Wah v PP [1988] 1 MLJ 348, CA (refd)

Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)

Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438; [2017] 8 CLJ 605, FC (refd)

Legislation referred to

Evidence Act 1950 ss 56, 57(1), (2), 106, Part II, Chapter III, Part III

Private Healthcare Facilities and Service Act 1998 ss 31(1)(a), 32

Private Healthcare Facilities and Services (Private Hospitals and other Private Healthcare Facilities) Regulations 2006

Appeal from: *Nur Fuziatun bt Mohd Fadzli (Menyaman melalui bapa dan wakil litigasinya, Mohd Fadzli bin Jamil) lwn Gombak Medical Centre Sdn Bhd dan lain-lain* [2024] MLJU 2055 (High Court, Kuala Lumpur)

Manmohan S Dhillon (with Aaika Zulaikha Mohd Yusop and Abigail Sarah Kumar) (PS Ranjan & Co) for the appellant.

Harjinder Singh Sandhu (with Izzah Shakirah Mohd Sukor) (Akberdin & Co) for the first respondent.

Chrishanthini AR Sebastiampillai (with Narandra Kangatharan) (S Chrishanthini & Co) for the second respondent.

Riza Makhzan Arifin (Sharifah & Assoc) for the third respondent.

Azizul Azmi Adnan JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant plaintiff, Nur Fuziatun Mohd Fadzli, is a minor. She claimed to have suffered brain injury arising from the circumstances of her birth, resulting in cerebral palsy. It is a permanent and life-long condition. Through her father and litigation representative, she sued the three respondent defendants.

[2] For the purposes of this judgment, the parties are referred to here as they were at the court below.

[3] Gombak Medical Centre Sdn Bhd, the first defendant, was the private medical facility where the plaintiff was delivered. It is no longer in operation.

[4] The second defendant, Dr Noor Fidak Samsudin was the 'person in charge' of the Gombak Medical Centre within the meaning of s 32 of the Private Healthcare Facilities and Service Act 1998. She was also the head of the Obstetrics and Gynaecology Department of the first defendant.

[5] The third defendant Dr Zana Zalinda S Mohd Ghazali was the doctor who undertook delivery of the plaintiff.

[6] The plaintiff initially claimed against two other defendants, but these actions were subsequently discontinued. The first defendant issued a notice of contribution and indemnity against the second and third defendants.

The plaintiff's claims

[7] The plaintiff claimed that the defendants were negligent in providing medical care to the plaintiff and her mother and in attending to her birth. There were a long list of allegations of negligence, which included the failure to have an adequate system of referrals, in having appropriately qualified specialists available on standby, in the failure to properly diagnose fetal distress and in negligently undertaking a vacuum extraction.

At the High Court

[8] The High Court found that the case against the third defendant Dr Zana Zalinda failed on account that the plaintiff failed to establish causation: that the plaintiff's condition was brought about by the negligence of Dr Zana Zalinda in carrying out the delivery. Specifically, the High Court found:

(a) the absence of complete cardiotocography records precluded the court from finding that Dr Zana had in any way acted negligently in attending to the birth of the plaintiff;

(b) the light meconium-stained liquor does not provide conclusive proof that a foetus is in distress;

(c) that plaintiff's own expert, Dr Ong, agreed that in 85–90% of cases, cerebral palsy developed in utero and only in the remainder of cases that the condition arose as a result of the acts of doctors; and

(d) on the contention that Dr Zana had incorrectly carried out the vacuum extraction delivery, the court found that the delivery had been carried out in accordance with the procedures recommended in a publication entitled *Vacuum Extraction* published by the US National Library of Medicine (Tonismae T, Canela CD, Gossman W Vacuum Extraction. (Updated 2023 July 29). In: StatPearls (internet). Treasure Island (FL): StatPearls Publishing; 2025 January. Available from: https://www.ncbi.nlm.nih.gov/books/NBK459234/).

[9] As a result of these findings, the High Court was of the view that the issues relating to the liabilities of the first and second defendants also fell away. The grounds of judgment stated:

> [81] Sehubungan itu, mahkamah ini mendapati bahawa tiada pelanggaran kewajipan *duty of care* oleh D3 terhadap Plaintif dan/atau ibu Plaintif. Dalam keadaan sedemikian, isu-isu berkenaan:
>
> (a) kuantum ganti rugi;
>
> (b) liabiliti Gombak Medical Centre; dan
>
> (c) liabiliti D2;
>
> kini menjadi akademik. Apabila D3 didapati tidak bertanggungjawab atas dakwaan tort kecuaian perubatan, soal liabiliti di pihak Hospital (sebagai penyedia perkhidmatan kesihatan) dan D2 (sebagai orang yang bertanggungjawab di Hospital) tidak timbul, apatah lagi isu ganti rugi. Begitu juga, Notis Indemniti dalam Lampiran 27 bukan lagi isu dan tidak memerlukan analisa lanjut daripada mahkamah ini.

[10] The High Court dismissed the plaintiff's claim and struck out the notice of contribution. The parties were directed to bear their own costs.

Summary of this court's decision

[11] The following paragraphs summarise our findings in this case:

(a) there existed a general duty on the part of the second defendant Dr Noor Fidak, as the person in charge of the first defendant Gombak Medical

Centre, to take reasonable care in the running of the hospital facilities to protect its patients from harm, and that this duty was owed to the plaintiff;

(b) at common law, a duty arose on the part of the first and second defendants to ensure that there would be timely access to all medical experts (including specialists in anaesthesiology and neo-natal care) as would be necessary to deal with complications that could reasonably be expected to arise in childbirth;

(c) the first and second defendants breached this duty of care by failing to make available a paediatrician specialising in neo-natal care whether on-call or for consultation at the time the delivery of the plaintiff was undertaken;

(d) there had been an unacceptable delay in transferring the plaintiff to a hospital that had neo-natal intensive care facilities and that this delay breached the duty of care that was owed by the first and second defendants to the plaintiff. In the case of Dr Zana Zalinda the third defendant, we are satisfied that she had done all that she could have in the circumstances to ensure that the plaintiff received the appropriate care in a timely manner;

(e) there was no negligence on the part of Dr Zana Zalinda either in diagnosing fetal distress or in the manner she had undertaken the delivery of the plaintiff;

(f) the finding of fact by the trial judge that causation has not been proven was plainly wrong, as there were critical items of evidence that were not taken into account in the analysis of the facts in the grounds of judgment of the High Court:

(i) the low Apgar score established that the baby suffered from respiratory issues, and hypoxia is one of the causes for cerebral palsy;

(ii) neither the plaintiff nor her mother possessed any of the risk factors that indicated congenital cerebral palsy; and

(iii) the unanimous view of both the experts was that the plaintiff's cerebral palsy developed as a result of the complications at birth. The High Court could not have come to a contrary finding without concluding that those opinions were obviously indefensible and unsupported by the basic facts of the case; and

(g) the breach of duty on the part of the first and second defendants to provide timely access to neo-natal intensive care facilities materially and adversely contributed to the plaintiff's condition.

A THE PRINCIPLES OF NEGLIGENCE GENERALLY

[12] At the outset, it may be observed that the High Court committed a fundamental error when it dismissed the plaintiff's claims against the first and second defendants consequent upon the finding that Dr Zana had not acted negligently in undertaking the delivery. The plaintiff claimed to have direct causes of action in negligence against the Gombak Medical Centre and Dr Noor Fidak. Some of the contentions of negligence were independent of the actions alleged to have been committed by Dr Zana. For example, it was alleged that the Gombak Medical Centre was under an obligation to have an anaesthetist and a paediatrician available during delivery. If indeed such obligation existed and it was established that the first defendant had failed to provide for a paediatrician to be available on standby, then this breach would have established liability against the first defendant independently of the contentions of negligence against Dr Zana.

[13] Similarly, it was alleged that there was a delay in transferring the plaintiff to a hospital with neonatal intensive care facilities. Liability for this delay would have been independent of any contention of negligence during delivery. Put another way, the doctor undertaking delivery may well be blame free, but there may have been subsequent delay in ensuring that a patient is given adequate follow-up care, and this delay, if it materially and adversely contributes to the damage or injury suffered, may establish liability on the part of the hospital even in the absence of negligent conduct in undertaking the delivery.

[14] As a consequence of the misdirection by the court below on the question of the incidence of liability, it will be necessary for this court to consider afresh the scope and extent of the duties that are owed by the defendants to the plaintiff.

The elements of negligence

[15] In a claim for negligence, a plaintiff will need to establish the existence of a duty of care owed by the defendant to the plaintiff, he must prove that there was a breach of that duty of care, and that the breach had caused damage to the plaintiff, and finally it must be shown that the damage claimed was not too remote, in that it was a reasonably foreseeable consequence of the breach.

[16] The principles relating to the duty of care of medical practitioners have been explained in the Federal Court case of *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438; [2017] 8 CLJ 605. They may be summarised as follows.

(a) a medical practitioner will owe a duty of care to his or her patient when

advising, diagnosing and treating that patient;

(b) when considering whether there has been a breach of the duty to advise the patient, it is for the court to decide whether the patient has been properly advised: *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229;

(c) by contrast, in connection with the duty to diagnose and treat the patient, the court will have regard to the practice accepted as proper by a responsible body of practitioners skilled in that particular art: *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118; and

(d) the court may, however, adopt a view that departs from the standards of the body of practitioners if those standards do not withstand logical analysis: *Bolitho v City & Hackney Health Authority* [1997] 3 WLR 1151.

[17] The accepted standards of medical practice can be established either through the publications of medical societies or by the opinion evidence of medical experts.

[18] As explained, in determining the applicable standard of care of the third defendant in undertaking delivery with a vacuum extractor, the High Court had made reference to a publication entitled *Vacuum Extraction* by the US National Library of Medicine. This document was not included in the trial bundles, not referred to by the medical experts or other witnesses and was also not referred by the parties in their submissions. We are of the view that the court below was perfectly entitled to refer to this publication, by reason of the proper application of s 57(2) of the Evidence Act 1950.

[19] As an exception to the general rule that facts must be proven by evidence, certain facts need not be proven if the court may take judicial notice of them. This is provided for in Chapter III of the Evidence Act 1950, s 56 of which states precisely that. Section 57(1) provides for a list of facts of which the court *must* take judicial notice. These include matters such as laws and regulations having the force of law. the course of proceedings in Parliament and the meaning of Malay and English words. In respect of those matters listed in s 57(1), the court may make reference to appropriate books or other documents of reference. Crucially, the court may also refer to books and documents of reference in relation to matters of 'public history, literature, science or art'. This is expressly provided for in s 57(2), which reads as follows:

> (2) In all these cases, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

[20] The observant reader will appreciate that there is an ellipsis in the drafting of s 57(2). By necessary implication, s 57(2) provides for the power of

A the court to take judicial notice of matters relating to public history, literature, science and art. However, unlike s 57(1), there is no duty on the court to take judicial notice of such matters; it is a matter of the discretion of the court.

B **[21]** Part III of the Evidence Act 1950 does not oust the common law rules of evidence for the courts to take judicial notice of facts. Thus, the court may take judicial notice of facts that are common and general knowledge that are sufficient notorious that it would be proper to assume its existence without proof.

C **[22]** The principles explained in the preceding paragraphs find support in the following dicta of the Supreme Court in *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30:

> D Now, the general rule is that all facts in issue and relevant facts must be proved by evidence. There are, however, two classes of facts which need not be proved, viz (a) facts judicially noticed and (b) facts admitted. The exceptions are dealt with by ss 56, 57 and 58 of the Evidence Act 1950 under the title 'Facts which need not be proved'. In so far as judicial notice is concerned, the provisions of s 57 subsection (1) makes it mandatory for the court to take judicial notice of all laws and regulations having the force of law, public Acts passed by Parliament, the course of E parliamentary proceedings and other matters that are enumerated in subsection (1)(a)–(o) of the section. The list however is not exhaustive since it is impossible to make a really complete list although a long list of facts which the English courts take judicial notice has been prepared. The important point to note is that s 57 does not prohibit the courts from taking judicial notice of other facts not mentioned therein. F The matter which the court will take judicial notice must be the subject of common and general knowledge and its existence or operation is accepted by the public without qualification or contention. The test is that the facts involved must be so sufficiently notorious that it becomes proper to assume its existence without proof. The opponent, however, is not prevented from disputing the matter by adducing evidence if he disputes it. (See *Sarkar on Evidence,* 13th Ed paras 606–609). Judicial G knowledge is continually extended to keep pace with the advance of art, science and general knowledge. Subsections (2) and (3) of s 57 provide discretionary power to the court to resort to the aid of appropriate books or documents of reference in all matters of public history, literature, science or art.

H **[23]** Even though the appellant has not sought to raise as a point of appeal the fact that the High Court referred to a document that had not been referred to by the parties in argument, we consider it appropriate for this issue to be addressed here, as it a point of law that may have an import outside of the scope of the present dispute.

I

THE EXISTENCE OF A DUTY OF CARE

[24] That the first and third defendants owed a duty of care to the plaintiff was not in material dispute. The second defendant, however, contended that

no such duty of care was owed by her, as the person in charge of the Gombak Medical Centre.

The duty of care of the second defendant

[25] A private healthcare facility such as the first defendants requires a licence to operate. This licence is issued under the Private Healthcare Facilities and Services Act 1998. Once licensed, the private healthcare facility must ensure that its facilities and services are maintained or operated by a 'person in charge': s 31(1)(a) of the Act. The definition of the expression 'person in charge' makes it abundantly clear as to scope of responsibilities of the person in charge, which is to be responsible for the management and control of the private healthcare facility:

> 'person in charge' means a person possessing such qualification, training and experience as may be prescribed and who shall be responsible for the management and control of the private healthcare facility or service to which a licence or registration relates;

[26] The key question for the court is whether, as the person in charge of a private healthcare facility providing obstetrical and gynaecological care and who has the *statutory duty* to manage and control the facility, Dr Noor Fidak the second defendant directly owes a tortious duty of care to patients of the facility?

[27] Three ingredients must be fulfilled in order to establish the existence of a duty of care:

(a) the injury suffered by the plaintiff must have been reasonably foreseeable;

(b) there must have been a relationship of proximity between the parties; and

(c) it must be just, fair and reasonable to impose a duty of care on the defendant in question.

[28] The above is a distillation of the dicta of Lord Bridge in the decision of the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 205, where it was held:

> [I]n addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[29] The observation may be made that the question of foreseeability of damage is considered twice in negligence cases: first when considering the existence of a duty of care, and again when considering the remoteness of damage.

[30] It is well settled in law that the director of a public hospital, as the head of the hospital, would directly owe a duty of care to the patients of the hospital: *Pengarah Hospital Selayang & Ors v Ahmad Azizi bin Abdullah James & Ors* [2012] 5 MLJ 679; [2013] 3 CLJ 833.

[31] We see no reason why this same conclusion ought not apply to a person who has been charged with the responsibility to operate and maintain a private healthcare facility. In this case, the injury to the plaintiff is of a nature that would have been reasonably foreseeable given the nature of the services provided by the first defendant. It would be reasonably foreseeable that a patient or customer of the first defendant would be injured if the second defendant fails to ensure that certain aspects of the operations of the first defendant is not up to the accepted standard. We are satisfied that, as between the plaintiff (as a patient of the first defendant) and the second defendant, there existed sufficient proximity between them as to give rise to a duty of care owed by the second defendant to the plaintiff. It has to be remembered that not only was the Dr Noor Fidak the person in charge of the Gombak Medical Centre (and hence bore the *statutory duty* under the Private Healthcare Facilities and Services Act 1998 and the Private Healthcare Facilities and Services (Private Hospitals and other Private Healthcare Facilities) Regulations 2006), but she was also the head of the Obstetrics and Gynaecology Department. This, in our considered view, made the proximity between the plaintiff and her all the closer. Finally, we are of the view that it would be just, fair and reasonable for a duty of care to be imposed on the facts of the present case. This is so because it is settled law that a duty would have been imposed by common law on a person holding an analogous position in a public hospital.

[32] In summary, we are of the view that there existed a general duty on the part of the Dr Noor Fidak, as the person in charge of the Gombak Medical Centre, to take reasonable care in the running of the hospital facilities to prevent its patients from harm.

The duty to make available paediatric care

[33] While the first and third defendants did not dispute that they owed a general duty of care to the plaintiff, they (and the second defendant) disputed that this duty of care extended to ensuring that there was a duly qualified paediatrician available on standby when deliveries were being undertaken.

[34] The plaintiff alleged that the failure to have a paediatrician available on standby breached the duty of care that was owed by the defendants to the plaintiff. The main retort of the defence was that there was no such requirement imposed on the first defendant, and hence there was no breach of the duty of care that was owed to the plaintiff.

[35] The evidence that was relied upon to establish that there was no such duty on the first defendant was the licence issued by the Ministry of Health to the first defendant (see E13/2287 of the record of appeal) under the Private Healthcare Facilities and Services Act 1998 for the period 13 January 2014 until 12 January 2016. It contained no requirement relating to paediatric care.

[36] By contrast, the licence issued subsequently, for the period 31 October 2016 until 30 October 2018 contained an express term requiring a paediatrician and anaesthetist to be available at all times:

TERMA ATAU SYARAT :

1. PEMEGANG LESEN, ORANG YANG BERTANGGUNGJAWAB DAN BUTIRAN LESEN (TAMBAH KAPASITI, KEMUDAHAN ATAU PERKHIDMATAN) TIDAK BOLEH DIPINDA;
2. LESEN TIDAK BOLEH DIPINDAH HAK MILIK;
3. TERHAD KEPADA KES-KES OBSTETRIK BERISIKO RENDAH;
4. MEMASTIKAN PAKAR ANESTESIA DAN PAKAR PEDIATRIK *READILY AVAILABLE AT ALL TIMES*;
5. KESELAMATAN PESAKIT ADALAH TANGGUNGJAWAB PEMEGANG LESEN SEPENUHNYA;
6. KEMENTERIAN KESIHATAN MALAYSIA TIDAK AKAN BERTANGGUNGJAWAB KE ATAS SEBARANG IMPLIKASI YANG BERLAKU SEKIRANYA PAKAR ANESTESIA DAN PAKAR PEDIATRIK YANG DILANTIK TIDAK DAPAT HADIR KETIKA DIPERLUKAN; DAN
7. PERLU MEMATUHI KEPERLUAN INFRASTRUKTUR DI BAWAH AKTA 586 DALAM TEMPOH 3 TAHUN DARI TARIKH 31 OKTOBER 2016.

[37] It was advanced for the defendants that, since the requirement for a specialist anaesthetist and paediatrician to be available at all times was only imposed after 31 October 2016, the contended absence of a paediatrician at

A the time of the incident (18 June 2014), even if true, did not constitute breach of the duty of care owed to the plaintiff.

[38] In our considered view, even if there did not exist at the time of the incident a *statutory duty* on the first defendant to ensure that a specialist B paediatrician was available at all times, at common law, a duty arose to ensure that there would be timely access to all medical experts (including specialists in anaesthesiology and neo-natal care) as would be necessary to deal with complications that could reasonably be expected to arise in childbirth.

C **[39]** For the reasons previously explained, the proximity between the parties is not in issue. The question, in our considered view, is whether the complications that can reasonably be expected to arise as a natural consequence of childbirth require a medical facility providing obstetrics and gynaecology services to have a paediatrician specialising in neo-natal care to be, if not D present, then available on standby. The only reasonable and logical answer is in the affirmative. The imposition of such a duty is, in our view, fair, just and reasonable.

E **[40]** Surely the defendants were not advancing the argument that all childbirths would be without complications, even if their facility only accepted low-risk patients. There would be myriad of reasons giving rise to complications that could not be anticipated from pre-natal examinations alone. It would be entirely foreseeable that a baby would be delivered with, say, F respiratory issues, requiring proper diagnosis and care.

[41] Accordingly, we are of the view that there existed a duty on the first and second defendants to ensure that there would be timely access to all medical experts (including specialists in anaesthesiology and neo-natal care) as would G be necessary to deal with complications that could reasonably be expected to arise in childbirth. This was not, however, a duty that was extended to the third defendant, as the physician undertaking the delivery of the baby.

BREACH OF THE DUTY OF CARE

H **[42]** The contentions of breach, in so far as they were material to the appeal before us, were as follows:

(a) as against the all the defendants:

I (i) the failure to procure the availability of a paediatric doctor to either be present, on standby or for consultation during or immediately after delivery; and

(ii) the delay in transferring the plaintiff to a hospital that had neonatal intensive care facilities; and

(b) as against Dr Zana Zalinda the third defendant specifically, that the manner in which the delivery was undertaken had breached the applicable standard of care, in particular relating to:

(i) the contended failure to undertake adequate cardiotocography readings;

(ii) the contended failure to correctly diagnose that the baby was in distress;

(iii) the contended failure to undertake caesarean section delivery as a result of that failure to properly diagnose that the baby was in distress; and

(iv) the allegedly improper technique employed during the vacuum extraction delivery.

[43] Each of these contentions of breaches are addressed in turn in the following paragraphs.

Failure to make a paediatrician available

[44] The evidence showed that there was in fact no paediatrician consulted at the material time.

[45] In our view, this was a fact within the particular knowledge of the defendants and they would have borne the evidential burden in accordance with s 106 of the Evidence Act 1950.

[46] The pleaded defence initially identified Dr Mohamed Najib Mohamed Unni as the consultant paediatrician available on standby. However, he not only turned out to be out of the country at the material time, but also had never been, at any time, engaged as a paediatric consultant to be available on-call for emergency cases at the Gombak Medical Centre. Dr Zana Zalinda stated at trial that she consulted one of two other paediatricians but could not remember which, and had admitted that she had made no attempt to contact them for the purposes of trial.

[47] In our considered view, the defendants failed to discharge their evidential burden to show that they indeed had a paediatrician specialising in neo-natal care available whether on-call or for consultation at the time the delivery of the plaintiff was undertaken. This, in our view, constituted a breach by the first and second defendants of their duty of care to the plaintiff.

[48] As explained, the court below made no finding on this point, except to state that the issue was academic because of the failure to prove causation.

The contended delay to transfer

[49] It was advanced for the plaintiff that the delay in transferring the plaintiff to a hospital that had appropriate neo-natal intensive care facilities constituted a breach of the duty that was owed by the defendants to the plaintiff.

[50] The plaintiff was born at midnight on 17 June 2014. Her Apgar score was three at one minute after birth, five at three minutes and six at ten minutes. She was recorded to be tachypnoeic (breathing rapidly) at 1.30am and had developed grunting by 3am.

[51] She was only transferred to Hospital Pusrawi at 6am.

[52] Both the experts in this case concurred that there was a delay on the part of the defendants to refer the plaintiff to a facility that had a neo-natal intensive care unit, or at least to have the plaintiff to be monitored, assessed and managed by a paediatrician within the first six hours of birth.

[53] This was the view expressed by the plaintiff's expert, Dr Ong Hean Choon:

> In my opinion, in the absence of a paediatrician or neonatal paediatrician to care for the moderate to severely asphyxiated baby, and absence of an in-house NICU (neonatal intensive care unit), the baby should have been referred out much earlier by the doctors at GMC (see E57/78).

[54] Dr Roslan's, the third defendant's expert, stated the following in his expert report:

> 5. Foetal outcome
>
> The baby was delivered in poor condition with an Apgar score of 3/5/6 and developed compromised respiratory/breathing function. The baby was attended to by the obstetrician and was never seen or assessed by a paediatrician. The baby was only later referred to a hospital with a paediatrician at 6 hours of birth. My primary concern was how the baby was monitored and managed without a paediatrician and proper NICU care in the period before the referral.
>
> 6. Conclusion
>
> It is my speculation that the insult to the baby occurred during the traumatic delivery and inadequate neonatal management, which was the delayed attention by a paediatrician (E57/91).

[55] In cross-examination, Dr Zana Zalinda explained that she had started calling tertiary hospitals at around 2.30am and was unable to get a government hospital which would accept the plaintiff. It was only after she obtained the

agreement of the father to ask a private hospital that she was able to secure a place at Pusrawi at about 5am in the morning (E9/980). Even after that there was difficulty in securing an ambulance, such that the patient only arrived at Pusrawi an hour later, at 6am in the morning.

[56] In our considered judgment, the version of events painted by Dr Zana may well have indicated that she had tried all she could have to secure a place for the plaintiff at a properly-equipped facility, but the fact that there did not appear to have pre-arranged procedures (for example Dr Zana testified that she had to hunt down mobile numbers of the medical officers of the neonatal intensive care units at the receiving hospitals) indicated that there was a system failure at the Gombak Medical Centre. Dr Zana testified:

> At that time, I dah hilang tak tahu mana lagi nak tanya, then I consulted the father, I have to cari private hospital. Dia cakap okay for that.

[57] The situation should never arise that the attending physician 'tak tahu mana lagi nak tanya'. There should be documented procedures for escalation if public hospitals are unable to accept a patient. A doctor should not be at wits end, as suggested by the testimony of the third defendant Dr Zana Zalinda.

[58] Counsel for Dr Noor Fidak made the point that none of the plaintiff's experts were experts in neo-natal care, implying somehow that the value of their testimonies was accordingly limited. We could not agree, as the point of contention was not the applicable standard of care to be discharged in providing neo-natal care to the plaintiff, but rather whether access to such care had been provided in a reasonably timely manner.

[59] We are of the view that there had been an unacceptable delay in transferring the plaintiff to a hospital that had neo-natal intensive care facilities and that this delay breached the duty of care that was owed by the first and second defendants to the plaintiff. In as far as Dr Zana Zalinda the third defendant, we are satisfied that she had done all that she could have in the circumstances to ensure that the plaintiff received the appropriate care in a timely manner.

The contended failure to diagnose fetal distress: cardiotocography & meconium stain

[60] A cardiotocogram allows the heart rate of the fetus to be recorded over a period of time. By contrast, a doppler fetal heat rate monitor (such as a Daptone device) only provides a snapshot of the current heart rate, and does not offer the ability to chart the heart rate for analysis.

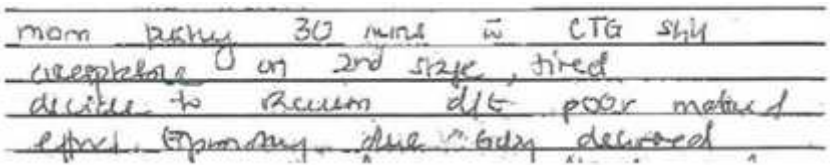
[61] It was advanced for the plaintiff that there had not been adequate

cardiotocography readings taken to monitor fetal heart rate, in particular after light meconium-stained liquor was detected. Criticism was also levelled at the doctor's notes, which was said to record the expression 'CTG slight acceptable'. The plaintiff's mother was placed in the left lateral position at about 8pm and 9.15pm on 17 June 2014 — counsel for the plaintiff suggested that this would only have been done had fetal distress been detected.

[62] We are of the view that the criticism of the third defendant on the use of cardiotocography readings was misplaced. It has been held in the case of *A minor (a minor suing through his mother and litigation representative, CCY) & Ors v Pengarah Hospital Tuanku Ja'afar, Seremban & Ors* [2025] 7 MLJ 422; [2024] 10 CLJ 22 that the guidelines applicable to government hospitals only require a cardiotocography trace to be recorded for 20 minutes on admission of the patient, and that doppler fetal heart rate readings may be taken thereafter. We see no reason why a higher standard should apply to private hospitals such as that operated by the first defendant.

[63] Dr Zana the third defendant explained at trial that she had not recorded 'CTG slight acceptable' in the doctors notes, but instead 'CTG *still* acceptable'. It appeared that the doctor's notes had been transcribed before it was sent to the Dr Ong, the plaintiff's expert.

[64] Having examined the doctor's notes at E19/1402 of the record of appeal, we would agree with Dr Zana. She had recorded 'CTG still acceptable', and there must have been a transcription error when the doctor's notes were typed out:



[65] In any event, the fact that Dr Zana recorded that the cardiotocography readings were still acceptable showed that the heart rate of the baby was still being monitored throughout the second stage of labour via a cardiotocogram. We are of the further view that, while the detection of light meconium stained liquor may be one of the indications of fetal distress, based on the evidence received at trial it is not definitive and may even be present in a normal pregnancy. In addition, there is no applicable guideline that suggests that an emergency caesarean section ought to be carried out where light meconium stain is detected. On the contrary, in the Handbook of Obstetrics Guideline issued by the Ministry of Health (https://www.moh.gov.my

/moh/resources/Penerbitan/Perkhidmatan%20OnG%20&%20Ped/O%20&%20G/FINAL_DRAF_LAYOUT_Handbook_of_Obstetrics_Guideline_PDF.pdf), surgical intervention is suggested in cases of *moderate and thick* meconium stained liquor.

[66] In as far as the fact that the mother had been placed in the left lateral position was concerned: it was never the plaintiff's case that the third defendant had in fact detected fetal distress but had failed to take the appropriate steps. The plaintiff's position had always been that Dr Zana had failed to detect fetal distress in the plaintiff. The plaintiff ought not be permitted to advance, in the appeal before us, an argument premised upon an unpleaded case.

Caesarean section

[67] For the same reasons explained in the preceding paragraphs, the contention that the third defendant ought to have made a decision to undertake a caesarean section to deliver the baby was not made out on the evidence, as there was nothing to suggest that surgical intervention was necessary in the circumstances of this case. The fact that the third defendant had not proceeded with a caesarean section delivery did not constitute a breach of the duty of care owed by her to the plaintiff.

Vacuum extraction

[68] Much was made in the submissions as to whether the third defendant had twice attempted vacuum extraction, or whether she had to reattach the suction cup of the vacuum extractor but had in fact only attempted vacuum extraction once. For her part, Dr Zana Zalinda testified that she had attached the suction cup twice, but only pulled once.

[69] The trial judge was of the view — and we agree — that the dispute of fact was academic, because either way, there would not have been breach of the applicable standard of care.

[70] The publication entitled Vacuum Extraction published by the US National Library of Medicine (see footnote 1, ante) recommends no more than three set of pulls, and no more than three cup detachments or pop-offs, with total vacuum application time limited to 30 minutes. The relevant passage states:

> Clinical Significance
>
> The decision to continue with operative vaginal delivery should continuously be re-evaluated during the delivery progresses. If there is no descent, further attempts should be discontinued and cesarean section considered.
>
> Rocking motions and applying torque to achieve rotation should be avoided.

A The maximum time to safely complete a vacuum extraction and the acceptable number of detachments are unknown. It is recommended that vacuum-assisted deliveries be achieved with no more than three sets of pulls and a maximum of two to three cup detachments or pop-offs. The total vacuum application time should be limited to 20 to 30 minutes.

B Sequential application of the vacuum and the forceps or vice versa is discouraged due to a higher risk of fetal and maternal injury.

[71] We conclude that there was no negligence on the part of Dr Zana Zalinda in undertaking the delivery of the plaintiff.

C

CAUSATION

[72] The High Court dismissed the entire claim on the premise that the condition of the plaintiff was not caused by the negligence of the third defendant. As explained, this did not deal with the entire pleaded case, as clearly both the first and second defendants owed duties of care to the plaintiff and her mother. Thus, if there was a material contribution of the injuries suffered by reason of the delay in procuring the appropriate post-natal care, there would have been an actionable breach.

D

E

[73] The fact that cerebral palsy develops in utero in 85–90% of cases due to congenital factors appeared to have weighed heavily in the mind of the learned judge in the court below. There were, however, critical items of evidence that did not appear to be considered by the High Court:

F

(a) the low Apgar score established that the baby suffered from respiratory issues, and hypoxia is one of the causes for cerebral palsy;

(b) neither the plaintiff's mother nor the plaintiff herself possessed any of the risk factors that indicated congenital cerebral palsy; and

G

(c) the unanimous view of both the experts was that the plaintiff's cerebral palsy developed as a result of the complications at birth.

H **[74]** Taken together, these factors establish that the cerebral palsy suffered by the plaintiff was not congenital, and had in fact arisen due to hypoxia in the course of birth. We have seen that the evidence showed that, on balance, that Dr Zana Zalinda the third defendant had not breached her duty of care to the plaintiff. That of itself would not be sufficient to absolve the first and second defendants of liability in this case. We are of the view that, their failure to provide timely access to paediatric care materially and adversely contributed to the plaintiff's condition.

I

[75] This conclusion is explained in the paras [80]–[95] below.

Causation and the But For Test

[76] The case of *Bonnington Castings v Wardlaw* [1956] 1 All ER 615 provides authority for the proposition that, where the act of a defendant was a material contributing cause to the injury suffered by the complainant, the defendant could be made liable for his tortious acts, even though it could not be said that the defendant's actions was the sole cause of the injury.

[77] *Bonnington Castings* was considered and applied in the Federal Court decision of *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1. I can do no better than to reproduce the relevant passages from the judgment of Richard Malanjum CJ (Sabah and Sarawak):

> [30] For the plaintiff to succeed in a claim for negligence, it is essential for him to prove among others that the injury caused to him was due to the defendant's negligence. There must be link between the wrongdoing and the damage caused. The burden of proving this link is upon the plaintiff — see *Bonnington Casting Ltd v Wardlaw.* In establishing this link between wrongdoing with injury there can be other possible causes. In such a situation, some courts have adopted the 'but for' test. Here the approach is not to identify all of the possible causes of a particular incident but focus on the effective cause of the resulting damage in order to assign responsibility for that damage caused. As confirmed by the authoritative text of *Clerk & Lindsell on Tort* (17th Ed) at paras 2–12, in majority of the cases this 'but for' test in practice operates well. But in situations where there are combined causes or several causes contributing to the wrongdoing then this 'but for' test may not be a satisfactory approach to determine causation. To deal with this, Lord Reid in *Bonnington Casting Ltd v Wardlaw* enunciated:
>
> > It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is material contribution must be a question of degree. A contribution which comes within the exception *de minimis non curat lex* (the law does not concerns itself with trifles) is not material, but I think that any contribution which does not fall within that exception must be material.
>
> [31] This statement is made in the light of these facts: The plaintiff had worked for eight years in a foundry producing steel castings. He contacted pneumoconiosis through inhaling the air in the foundry which contained silica dust. A source of the dust came from pneumatic hammers, one which was operated by the plaintiff. The defendant did not provide any protection to the plaintiff against this. But there were also dust which polluted the factory coming from operations conducted at swing grinders in the foundry. The ducts of the dust-extraction plant for these grinders were not kept free from obstruction as required by a statutory regulation. The defendant admitted that they were in breach of this regulation but maintained that there was no evidence adduced by the plaintiff to show that the noxious dust in the general atmosphere of the foundry came more from the pneumatic hammers than the swing grinders.

[78] After explaining the scope of the principle of causation in *Bonnington Castings,* the Federal Court explained that where there were multiple factors contributing to the injury suffered, the *Bonnington Castings* test would be more appropriate than the 'but for' test:

> [36] In the light to these authorities, we are of the view that the 'but for' test is not the exclusive test to be applied to determine causation of the injury. It can still be applied but not in circumstance when there are two or more acts or events or factors that could or contribute to the injury of the plaintiff. This instant case is a case in point where evidence is established that there are a multiple of factors that could bring about the injury to the plaintiff. And to decide whether there is causation in these circumstances the approach of Lord Reid in *Bonnington Casting Ltd v Wardlaw:* whether any of these acts or events or factors has materially contributed to the plaintiff's injury should be adopted. What is a material contribution must be a question of degree. This is for the court to decide but certainly anything that is trifle is not material. As Lord Reid in the same case expounded: 'contribution which comes within the exception of *de minimis non curat lex* (the law does not concerns itself with trifles) is not material'.

[79] The discussion in the preceding paragraphs are pertinent in the context of the present case, because it shows that even if the event that precipitated the injury arose through no fault of the defendants, the failures by one or more of the defendants to properly address the situation subsequently may still establish liability on their part, if those failures materially contributed to the plaintiff's condition.

The failure to account for the Apgar score

[80] The Apgar score for the plaintiff was 3–5–6 at one, five and ten minutes after birth respectively, which the experts agreed was poor. The poor Apgar score meant that the baby suffered from respiratory issues at the time of birth, suggesting that there was hypoxia from the circumstances of the delivery. Thus, the poor Apgar score indicated delivery trauma. The existence of delivery trauma would have been a material consideration in determining whether the cerebral palsy and hypoxic ischaemic encephalopathy suffered by the plaintiff happened in the course of delivery. This was not taken into account by the court below in its analysis of causation, and is, in our view, an appealable error.

[81] Put another way, the statistics may well indicate that cerebral palsy develops from congenital factors in 85–90% of cases. However, in the present case, it was established that the plaintiff had respiratory distress syndrome, due to the uncontroverted evidence of the low Apgar score. This, in our view, supported the conclusion that the condition from which the plaintiff suffers was not congenital, but acquired in the course of delivery due to deprivation of oxygen.

[82] The fact that a baby may be born with a low Apgar score does not mean that he or she is certain to suffer from brain damage — much depends on the steps that are immediately taken after birth.

Congenital vs acquired cerebral palsy

[83] At trial, a document entitled Causes and Risk Factors of Cerebral Palsy published by the Centers for Disease Control and Prevention was adduced by the first defendant. This document lists the risk factors for congenital cerebral palsy. They include: low birthweight, premature birth, multiple babies being carried at the same time, fertility treatment, in utero infections and medical conditions of the mother such as thyroid problems, intellectual disability and seizures. None of these apply to the plaintiff or her mother.

[84] This fact supports the conclusion that the cerebral palsy of the plaintiff had not developed in utero but rather arose from the circumstances of her birth.

Consensus of the experts

[85] The medical experts were in consensus that the cerebral palsy suffered by the plaintiff was caused by the circumstances of her delivery and the delay in providing adequate neonatal intensive care.

[86] Dr Roslan, the third defendant's expert, agreed that insult to the baby occurred during traumatic delivery. In his expert report (see E19/1365), he stated:

> 6. Conclusion
>
> It is my speculation that the insult to the baby occurred during *the traumatic delivery* and *inadequate neonatal management, which was the delayed attention by a paediatrician*.

[87] He uses the word 'speculation' in his report, and under-cross-examination, he explained that he meant 'guess'. Now, the role of an expert is to provide his professional opinion based on the established facts. Given that he has found it fit to include this sentence in the concluding section of his report, the court can only conclude that this was an expression of his professional opinion.

[88] The use of the word 'insult' also connotes that there was injury to the plaintiff as a result of the delivery. Its meaning, as used in medicine, is defined in the *Shorter Oxford Dictionary* to mean 'an action or process causing injury to the body or disturbance of its normal functions; the injury or disturbance so

A caused; trauma'. This effectively precludes the cause of the plaintiff's condition being the result of a congenital defect.

[89] Dr Ong's report explained his analysis of the low Apgar score in the following manner:

B

> After delivery, the baby was thus subjected to prolonged asphyxia, leading to prolonged partial hypoxia, or intermittent hypoxia, both of which have been known to result in cerebral damage and cerebral palsy.

C **[90]** In these circumstances, we consider that it would not have been open to the High Court to depart from the concurring views of the medical experts, without explaining the reasons for doing so.

[91] The existence of unchallenged medical opinions does not mean that a D trial court is bound to accept the expert evidence of the medical practitioners. A court may still make a finding that is contrary to unchallenged medical opinions, if there are other facts that would entitle it to do so. Wee Chong Jin CJ in the Singapore Court of Appeal case of *Sek Kim Wah v Public Prosecutor* [1988] 1 MLJ 348, referred to the decision of *R v Byrne* [1960] 2 E QB 396; [1960] 44 Cr App Rep 246 and stated as follows:

> Thus, the verdict as to abnormality of mind is plainly a finding of fact which must be founded on all the evidence which evidence of course includes medical opinion. Even where such medical opinion is unchallenged, the trial Judges would be F perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so.

[92] This principle in *Sek Kim Wah* was cited with approval by the Malaysian Court of Appeal in *Public Prosecutor v Muhamad Suhaimi Abdul Aziz* [2003] G MLJU 850; [2004] 1 CLJ 378.

[93] While a court may depart from the unchallenged evidence of experts, such a departure must be based on sound grounds: see *Lo Sook Ling Adela v Au Mei Yin Christina & Anor* [2002] SCD 46; [2002] 1 SLR 408 where the H Singapore Court of Appeal in discussing the evidence of a professor of botany on the age of a belimbing tree in a dispute involving a claim of adverse possession stated:

I

> It was true that the age of the Belimbing tree, being 20 years old, was only an estimate. Because it was an estimate, the trial judge could not accept the evidence of Prof Rao. *In law, while a judge is not obliged to accept the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds*: see *Saeng-Un Udom v PP* [2001] 3 SLR 1 at 8–9. We did not think just because the age given was an estimate, that that in itself was a good ground to reject the expert opinion. In the realm of expert evidence, it invariably involves a

matter of judgment. This was a scientific issue outside the learning of a judge. (Emphasis added.)

[94] The Court of Appeal in Malaysia in the case of *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171; [2014] 9 CLJ 337 cited with approval the passage from *Dr Lo Sook Ling Adela v Au Mei Yin Christina* above, and formulated the applicable principles in the following manner:

> We are in agreement with these principles and in our view, a judge who is not an expert himself, should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions, the judge is of course entitled to bring to bear his own judicial appreciation of the matter, and choose one over the other, but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case.

[95] We are thus constrained to find that the finding of fact by the trial judge that causation has not been proven was plainly wrong, as these critical items of evidence were not taken into account in the analysis of the facts in the grounds of judgment of the High Court:

(a) the low Apgar score established that the baby suffered from respiratory issues, and hypoxia is one of the causes for cerebral palsy;

(b) neither the plaintiff nor her mother possessed any of the risk factors that indicated congenital cerebral palsy; and

(c) the unanimous view of both the experts was that the plaintiff's cerebral palsy developed as a result of the complications at birth. The High Court could not have come to a contrary finding without concluding that those opinions were obviously indefensible and unsupported by the basic facts of the case.

[96] In our considered judgment, the breach of duty on the part of the first and second defendants to provide timely access to neo-natal intensive care facilities materially and adversely contributed to the plaintiff's condition. As explained, this was the unanimous view of the experts who testified in this case.

ORDERS

[97] For the reasons explained in this judgment, there is judgment as follows:

(a) we allow the plaintiff's appeal against the first and second defendants;

(b) the plaintiff's appeal against the third defendant is dismissed;

A (c) we direct that the case be sent back to the High Court for assessment of damages, to be heard before another judge of the High Court;

(d) the liability of the first and second defendant for damages and interest on any such award of damages to the plaintiff is joint and several;

B (e) the first and second defendants shall pay pre-judgment interest on the principal sum of damages assessed at a rate of 5%pa from 7 February 2020 until the date of the order of the High Court ascertaining the damages payable;

C (f) the first and second defendants shall pay post-judgment interest at a rate of 5%pa on the sum of:

(i) the principal sum of damages ascertained; and

(ii) the pre-judgment interest,
from the date of the order of the High Court ascertaining damages until full satisfaction;

D

(g) the first and second defendants shall pay to the plaintiff costs here and below of RM100,000 (liability for such costs to be joint and several);

E (h) the plaintiff shall pay to the third defendant costs of this appeal in the amount of RM40,000; and

(i) all such costs shall be subject to an allocatur.

[98] The order of the High Court is accordingly set aside to the extent above.

F

[99] The liability of the first defendant Gombak Medical Centre to the plaintiff are in respect of duties that the first defendant owed directly to the plaintiff. As a consequence, the notice of contribution and indemnity by the first defendant against the second and third defendant is dismissed.

G

Plaintiff's appeal against first and second defendants allowed; plaintiff's appeal against third defendant dismissed.

Reported by Dzulqarnain Ab Fatar

H

I